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No. 958

In the Supreme Court of the United States

OCTOBER TERM, 1957

M. MEADS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
ALAN S. ROSENTHAL,
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OPINIONS BELOW

The decision of the Court of Claims overruling the cross motions for summary judgment (R. 196–200) is reported at 156 F. Supp. 938.

JURISDICTION

The order of the Court of Claims was entered on December 4, 1957. On February 4, 1958, the time for filing a petition for a writ of certiorari was extended by the Chief Justice to May 3, 1958. The petition for a writ of certiorari was filed on April 28, 1958. The jurisdiction of this Court is presumably invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether this Court should review an interim order of the Court of Claims which (1) overruled cross motions for summary judgment on the ground that there was an unresolved issue of material fact, and (2) granted leave to the parties to renew their motions if they could accompany such renewal with sufficient documentary proof on the unresolved issue.

STATUTE INVOLVED

28 U. S. C. 1255 provides in pertinent part:

> § 1255. *Court of Claims; certiorari, certified questions.*
>
> Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted on petition of the United States or the claimant;
>
> * * * * *

STATEMENT

On August 13, 1946, petitioner entered into a contract with the Foreign Liquidation Commissioner for the purchase of a portable sawmill declared surplus and purportedly on hand in Engineers Depot No. 14 in the vicinity of Manila, Republic of the Philippines (R. 20–22). Although an invoice covering the sale was issued upon petitioner's payment of the purchase price, $1,405.65, no sawmill was ever delivered to petitioner (R. 22 and Pet. App. 96). Records of the Foreign Liquidation Commissioner indicate that there was no sawmill in depot stock and that efforts were made to obtain a sawmill satisfactory to petitioner (Pet. App. 98). These efforts were unsuccessful, and

on May 20, 1949, the purchase price was tendered to petitioner under article 8 of the contract (R. 21).[1] This tender was refused by petitioner (R. 196).

On August 12, 1952, petitioner filed his petition in the Court of Claims, alleging that the Government had breached the contract. In his prayer for relief, petitioner demanded (1) $4,216,825.25 as compensation for the use of the sawmill from September 1, 1946, to July 31, 1952, plus interest in the amount of $1,072,117.75 and (2) compensation and interest from August 1, 1952, to the date of judgment in the amount of $3,020,050.00. In an amended petition filed on September 19, 1952, petitioner added a prayer for an additional $1,825,000.00 as special damages, as well as a claim for treble damages (R. 18, 19).

On December 26, 1956, the United States filed a motion for summary judgment, except as to the return of the purchase price to petitioner (R. 35). On May 6, 1957, petitioner filed a cross motion for summary judgment (R. 49). On December 4, 1957, the Court of Claims denied both motions. After pointing out that, under its prior holdings and the terms of the contract, petitioner was not entitled to recover damages for breach of contract (but only the purchase price) if the sawmill was nonexistent at the time the contract was entered into, the Court said (R. 200):

> Because there is an issue as to this fact, which has not been clarified by the documents filed,

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[1] As noted by the Court of Claims, article 8 provides generally that variations between the number of items sold and actually delivered will be adjusted on the basis of the purchase price of each item.

we must overrule defendant's motion for summary judgment, as well as plaintiff's, but leave is granted to the parties to renew their motions and support them, if they can, by other affidavits or other documents, to show whether or not defendant actually had a sawmill on hand at the time of the contract with plaintiff which it could have then delivered to him.

Plaintiff's and defendant's motions for summary judgment are overruled.

It is so ordered.

ARGUMENT

The petition for certiorari should be denied. The order which petitioner seeks to have reviewed by this Court simply denied cross motions for summary judgment on the ground that there remained an issue of material fact. The Court of Claims has decided nothing except that neither party was entitled to summary judgment on the basis of the unclear factual situation then before the court. No final order has been entered on any issue.[2]

With the case in this posture we are confident that the Court would not wish to review the interim order of the Court of Claims if it had jurisdiction to do so. No special reasons are advanced why this Court should take the case away from the Court of Claims at this juncture, assuming that power to do so existed. No legal rights of petitioner will be prejudiced by allow-

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[2] On April 11, 1958, petitioner renewed his motion for summary judgment. On May 2, 1958, that motion was denied. The Government has advised the court below that it does not intend to renew its motion for summary judgment. The case will presumably be set for trial in the near future.

ing the case in the Court of Claims to proceed to judgment.

CONCLUSION

It is respectfully requested that the petition for certiorari be denied.

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